



**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR QUALITY DIVISION**

**OPERATIONAL MEMORANDUM
NO. 7**

**SUBJECT: PROCEDURE FOR IMPLEMENTATION OF THE RENEWABLE
OPERATING PROGRAM APPLICATION SHIELD**

EFFECTIVE DATE: May 1, 1996

REVISED DATE: February 14, 1997

EXECUTIVE SUMMARY

This Operational Memorandum was developed in response to numerous Air Quality Division (AQD) staff and regulated community member's requests for clarification on the application shield. This memo defines the application shield, how it is applied, and the potential impacts that the loss or failure to obtain an application shield can have on a subject source. The procedure outlined in this memo describes steps that Division staff will take to notify a subject source that they have failed to submit a timely and administratively complete application in accordance with the State Act and the federal Clean Air Act. It also describes the factors that will be considered by AQD in determining an appropriate course of action for the failure to submit a timely and administratively complete application.

PREAMBLE

The Renewable Operating Permit (ROP) program, as embodied in Part 55 of Act 451 and Rules 210 through 218, provides for an "application shield" for subject sources. This is a new concept in Michigan's air quality program, resulting in many questions about its interpretation and use.

An application shield is defined in Rule 210(1) which states:

"The ability to operate the process and process equipment at a stationary source while a timely and administratively complete application is being reviewed and acted upon by the department shall be referred to as the "application shield". The application shield provided by this subrule shall not apply if an application submittal is not timely pursuant to the applicable provision of subrules (4) to (7) of this rule or administratively complete pursuant to subrule (2) of this rule or an additional information request submittal is not timely or complete pursuant to subrule (3) of this rule."

Thus, if a ROP application is submitted on or before the dates listed in subrules 210 (4) through (7) and the application is deemed to be administratively complete, the application shield applies. This shield allows continued operation of the facility (after the application has been received by the department but before the permit is issued) without being in violation of Rule 210, which requires that:

“A person shall not operate any process or process equipment located at a stationary source required to obtain a renewable operating permit under R336.1211, except in compliance with all applicable terms and conditions of a renewable operating permit, unless a timely and administratively complete application has been received by the department in accordance with the following provisions of this rule.”

This shield remains in place as long as additional information requests are responded to in a timely and complete manner.

Implementing the ROP Program

Due to the complexity of this new program the Air Quality and Environmental Assistance Divisions have pursued many avenues to proactively inform the regulated community and promote compliance with the ROP program, including the permit application submittal deadlines. Numerous trade associations have been well represented in the rule development process and the forms development work groups. AQD staff were brought into groups known as “Contact Teams” which interface with the industry groups to help address issues which may be of importance for these sources during the ROP permitting process. Permit applications were sent in August, 1995, to all companies AQD identified through its emissions inventory as subject to the ROP program. Workshops continue to be held on topics such as how to determine ROP applicability and how to fill out and submit the ROP permit application forms. Several weeks prior to submittal deadlines, the Environmental Assistance Division sends letters notifying that group of companies that the submittal deadline is approaching. All of these activities stress the application submittal deadlines and represent the department’s commitment to inform subject sources of their obligations under the ROP program.

The Components of an Application Shield

There are three main components to the application shield: timely application submittal, administrative completeness, and technical completeness. Failure to meet a requirement of any of these components can result in the failure to obtain or retain an application shield for a facility.

Meeting the initial application submittal deadline is the first step in obtaining an application shield. Rules 210 (4) through (7) are structured to phase in all of the application submittals over a period of one year, allowing AQD enough time and resources to process the permits in a timely manner. Rule 210 states that once a timely and administratively complete application is received, AQD has a designated amount of time to act on the permit. The application shield was developed to be used as an incentive to the companies to submit timely applications in accordance with the schedule and as a tool for AQD to use to encourage timely and administratively complete submittals and responses. Meeting the phased-in applications deadlines assures a balance between staff resources and permit workload.

The administrative completeness component is the next step in the application shield determination. When a permit application is submitted, AQD has 60 days, if submitted in paper form, to determine if it is administratively complete, and 15 days if submitted in electronic form. If AQD fails to notify the company that the application lacks any of the necessary information,

the application is automatically considered administratively complete. AQD's notification identifies the deficiencies in the application and sets a deadline for response. If a complete response is made by the deadline, the application is administratively complete. At this point, a facility owner that has submitted an application that is timely per Rule 210(4) through (7) and is administratively complete per Rule 210 (2)(a) obtains the application shield. **It is important to note that once this opportunity has passed, the application shield cannot be obtained.**

The technical completeness component refers to the loss of a facility's application shield for failure to respond in a timely manner to an AQD request for additional information during the technical review of the application. The steps for staff to take to request the additional information are specified in Rule 210(3). When an application lacks necessary technical information, a permit reviewer will send a letter to the facility, noting the technical information deficiency and requesting submittal of the necessary information by the specified deadline. Rule 210(3) allows the company 30 days to respond to the initial request, an opportunity to extend that deadline by an additional 30 days and, before the end of the 60 days, a final opportunity to explain their need for a further extension of the deadline. Failure to make a timely and complete response within the allotted deadline results in the automatic loss of the application shield.

Implications of Late Application Submittals

If AQD were to allow untimely submittals it could find itself in a situation where it must process a large number of applications without the resources to process the permits in a timely and efficient manner. In addition, sanctioning late submittals creates an issue of whether this is fair to the companies who expended the resources to submit in a timely manner. A process needs to be in place to allow AQD flexibility in enforcing the submittal deadlines but at the same time insuring equitable treatment for all companies.

If a ROP owner never receives or subsequently loses the application shield, they are faced with a decision to either continue to operate or cease operations until AQD acts upon the permit application. Operating the facility would violate not only Rule 210 and Section 5506 of Act 451, but also Section 502 of the Clean Air Act (CAA). If the facility continues to operate, the owner risks potential enforcement by the state, federal government, or citizens (under CAA Section 304). A state policy decision to enforce or not enforce Rule 210 does not eliminate the jeopardy a ROP facility owner faces by continuing to operate.

AQD ENFORCEMENT APPROACH

1. The Department of Environmental Quality will continue outreach efforts with subject sources, informing them of application requirements and submittal deadlines while identifying the implications for failure to obtain and retain an application shield. AQD will notify each applicant of any failure to obtain or retain an application shield and the possible implications of continued operation without the benefit of the application shield.
2. AQD will decide upon possible enforcement action on a case by case basis, taking into consideration the following factors:
 - a) What efforts the owner/operator has made to comply with the Rule 210 (4) through (7) deadlines and Rule 210(2) administrative completeness process. The lack of either application submittal or response to additional information requests

(as opposed to late submittal or responses) will be considered the more serious violation. Pursuant to Rule 210(1), any enforcement action will take into account the time period between the applicable deadline and when a person actually submits the required administratively complete application or additional information.

- b) Whether there has been repeated instances of late and/or incomplete submittals associated with a specific ROP-subject facility.
 - c) The presence of other air quality violations at the facility which are identified through the ROP process.
 - d) Any timely and administratively complete permit applications which have been submitted to AQD which would legally allow the facility to “opt out” of the ROP program. If a NSR opt-out application is submitted, the amount of time between the submittal of a complete “opt out” permit application and the ROP application deadline will also be weighed.
 - e) Future guidance from the United States Environmental Protection Agency concerning the significance of these violations.
3. AQD will treat violations equitably in keeping with the goal of equitable enforcement for all subject sources. Cases with similar circumstances will be treated in a similar manner with respect to any enforcement action taken by the state.
4. The state ROP rules do not provide that a late submittal enables one to obtain a belated application shield. However, some applicants that fail to obtain or retain an application shield may seek to resolve the violation through a consent order and payment of a penalty. While the application shield would not be granted, this would end the violation time period, legally permit continued operation during the remainder of the application review period, and provide the applicant with some measure of “comfort” that such formal settlement of the violation would prevent or dissuade federal or citizen enforcement actions. The Division will work with any facility owner that requests such settlement in an attempt to reach a mutual agreement.

PROCEDURE

1. Within 30 days after each application submittal deadline in Rule 210 (4) through (7), AQD staff will compare the district lists of ROP applications expected to be received with lists of those that have been received (i.e., identifying non-submittals). Staff will then identify and remove the following from the non-submittal list:
- a) All facilities for which an opt-out permit or general permit serving an opt-out function has been issued.
 - b) Any facility for which an opt-out permit application (general or site-specific) is pending will be removed from the list until the application review indicates whether the facility qualifies for the opt-out. If the facility does not qualify for an opt-out, the facility will immediately be added to the non-submittal list.

- c) All facilities submitting complete registration forms including summary tables under Rule 208a. This registration process allows a source to accept 50% of all major source emission thresholds as legally enforceable limits, so no renewable operating permit is necessary. If AQD later determines that the source does not meet the criteria for limiting its potential to emit pursuant to Rule 208a, the source will immediately be added to the non-submittal list.
2. Within 30 days after each application submittal deadline, AQD staff will send a letter of violation to the owners of all facilities on the non-submittal list. This letter will state that the company has failed to obtain the application shield and has 60 days to respond with a complete application. The letter will also describe the implications of operation without the application shield.
3. There may be legitimate reasons why a facility has not and should not submit a ROP application, including, but not limited to, a subject facility has permanently shut down, or a facility is subject to a later submittal deadline than our records indicate. The responses to letters of violation should be reviewed carefully to identify legally acceptable demonstrations that a violation of Rule 210 does not exist.
4. If a facility owner does not: a) demonstrate that no Rule 210 violation exists, or b) submit a complete ROP application within the deadline established through the letter of violation, the case will be reviewed among Compliance Branch supervisors according to existing procedures. The review will consider the factors identified in this memo as they pertain to the specific facility and determine an appropriate course of enforcement action.

USE OF THIS OPERATIONAL MEMORANDUM

This Operational Memorandum applies only to non-submittals or late or administratively incomplete submittals of ROP applications during the initial issuance under Rule 210 (4) through (7). The presence of other violations along with this may cause a different course of action to be followed. In addition, sources that AQD has not identified as ROP-subject but later are found to be subject may be handled differently. This Operational Memorandum does not create any rights, is not a defense in a legal action, and cannot be used or relied upon in legal proceedings. This Operational Memorandum may be changed without notice.

Questions about this memorandum should be directed to Barb Rosenbaum at 517-335-4609.

RSJ:BR:amh